No. 883

FILED
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JOHN F. DAVIS, C

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

STATE OF ALABAMA, AND
N. L. HALE, Warden,
Atmore State Prison Farm
Atmore, Alabama,
et al.,

PETITIONERS

vs.

CECAL BELL,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. _____

SUPREME COURT OF THE UNITED STATES

In the

OCTOBER TERM, 1966

STATE OF ALABAMA, AND

N. L. HALE, Warden,

Atmore State Prison Farm

Atmore, Alabama

et al.,

PETITIONERS

vs.

CECAL BELL,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The State of Alabama and N. L. Hale, as Warden of Atmore State Prison Farm, Atmore, Alabama, et al., by and through the Attorney General of the State of Alabama, Richmond M. Flowers, petition for a writ of certiorari to review the order, judgment, and decision of the United States Court of Appeals for the Fifth Circuit, entered in the above captioned case on September 29, 1966, rehearing denied without further opinion on November 1, 1966, and a stay of the mandate granted on November 16, 1966.

OPINIONS BELOW

The order and judgment of the United States District Court for the Southern District of Alabama denying habeas corpus is unreported, but is dated July 26, 1965, and is printed in Appendix A hereto, infra, pp. 11-12.

The United States District Court then denied a certificate of probable cause, dated August 31, 1965, and same is printed in Appendix B hereto, infra, pp. 12-13.

The United States Court of Appeals for the Fifth Circuit did by an order entered on November 2, 1965, grant a certificate of probable cause, and same is printed in Appendix C hereto, infra, pp. 13.

The opinion, order and judgment of the United States Court of Appeals for the Fifth Circuit granting the Application for habeas corpus and reversing the United States District Court, is unreported to date, but is printed in Appendix D hereto, infra, pp. 14-22.

The United States Court of Appeals for the Fifth Circuit did deny the petition for rehearing, by an order dated November 1, 1966, and did further decline to consider certain affidavits filed in connection with this by order entered on November 1, 1966, which is unreported to date, but is printed in Appendix E hereto, infra, pp. 23.

The order granting the stay of the mandate, judgment, and opinion in the case at bar is dated November 16, 1966, and is printed in Appendix F hereto, infra, pp. 24.

In the case at bar, no effort was made to appeal any proceedings had in State Court, either at the time of original trial or the subsequent coram nobis proceedings to the Appellate Courts of Alabama, hence there are no Alabama appellate opinions.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 29, 1966, and Applica-

tion for Rehearing denied on November 1, 1966; however, a petition for stay of the mandate of the United States Court of Appeals for the Fifth Circuit was granted on November 16, 1966.

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I

Whether, under the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution, the opinion in the case at bar "abbreviates" the appeal period for taking an appeal from post conviction proceedings in State Court in Alabama, contrary to the decision of the highest Appellate Court in Alabama, all being a matter concerning the orderly exhaustion of State remedies under Title 28, Section 2254, United States Code, before presenting the petition for writ of habeas corpus to the United States District Court? See *Keeton v. State*, 278 Ala. 81, 175 So. 2d 774.

II

Whether, the decision and opinion of the United States Court of Appeals for the Fifth Circuit dated September 29, 1966, rehearing denied November 1, 1966, fails to take into account or allow a presumption of correctness of State Court proceedings, all pursuant to the provisions of *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770?

III

Whether, the opinion of the United States District Court, dated July 26, 1965, without opinion or calling upon the State of Alabama for response, should be affirmed due to the failure of either the respondent, Cecal Bell, or his *retained counsel*, the Honorable Peter A. Hall, to *make any effort to appeal* the denial of his coran nobis proceedings, in the Circuit Court of Marengo County, Alabama, hence does not such failure *to make any effort to appeal*, constitute a deliberate by-pass of orderly State procedure within the meaning of *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 2d 837?

IV

Whether or no the failure of either the respondent, Cecal Bell, or his retained counsel to make any effort to appeal the denial of his coram nobis proceedings in State Court, constitutes a deliberate by-pass of orderly State procedure, or is such required as a condition precedent to the exhaustion of State remedies, pursuant to the provisions of Title 28, Section 2254, United States Code, and *Lane v. Brown*, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed. 2d 892?

V

For that in light of the fact that the record in the case at bar, affirmatively reflects that the United States Court of Appeals for the Fifth Circuit did request certain information from certain State authorities, (inasmuch as no return or reply had been requested of the State by the District Court), and this information furnished to the Appellate Court and subsequent information furnished in affidavit form on Application for Rehearing, to the Appellate Court, then should not such information be given a presumption of correctness by the Appellate Court, pursuant to the provisions of *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770, instead of accepting as true the statements made in brief by the petitioner, acting pro se?

VI

Does not the opinion of the United States Court of Appeals for the Fifth Circuit in the case at bar, dated September 29, 1966, rehearing denied, November 1, 1966, *remove from the United States District Court the discretion* of whether or no an additional plenary hearing is required in the case at bar, contrary to the opinion of this Honorable Court in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770?

VII

Whether or no the United States District Court and the United States Court of Appeals for the Fifth Circuit could rely upon the State Court record which *affirmatively reflects* that the appellant was advised of his right to remain silent and that any statement made could be used in evidence against

him as a basis for the denial of habeas corpus without an additional hearing, pursuant to *Edwards v. Holman*, 342 Fed. 2d 679, cert. den., *Edwards v. Holman*, June 20, 1966, _____ U.S. _____, _____ S.Ct. _____, 16 L.Ed. 2d 1039?

VIII

Whether or no the United States District Court and the United States Court of Appeals for the Fifth Circuit could rely upon the State Court record which shows that an intelligent guilty plea was made in the case at bar, or should not such State Court determinations be allowed a presumption of correctness, and further, could not such intelligent guilty plea preclude going back into the issue of an alleged coerced confession? See *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770; *Busby v. Holman*, 356 Fed. 2d 75; and *Cooper v. Holman*, 356 Fed. 2d 82.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution.

STATEMENT

The respondent, Cecal Bell, was originally convicted in the Circuit Court of Marengo County, Alabama, on November 16, 1961, on five separate indictments each charging the respondent with the offense of Grand Larceny, being Marengo County Circuit Court Nos. 5380, 5381, 5382, 5383, and 5384, at which time the respondent, Bell, did change his pleas from not guilty to guilty, following consultation with his court appointed counsel, the Honorable John W. Drinkard, and received a sentence of five (5) years in each case, the sentences to run consecutively. The respondent, Bell, did not make any effort to appeal these convictions to the Appellate Courts of the State of Alabama. Mr. Drinkard did represent the petitioner both at arraignment and on trial. See a copy of the affidavit of Mr. Drinkard dated October 7, 1966, and printed herein as Exhibit "G," infra, pp. 24-26. Also please see certificate of Mr. C. E. Rentz dated January 5, 1966, a copy of which is printed as Exhibit "H" hereto, infra, pp. 26-30. This certificate was sent

the U.S. Fifth Circuit in early 1966 at the request of that Honorable Court. See further the affidavit of Mr. C. E. Rentz date October 7, 1966, and printed as Exhibit "I", infra, pp. 30-32.

The respondent, Cecal Bell, did file his first petition for writ of error coram nobis in the Circuit Court of Marengo County, Alabama, under date of January 7, 1964. The respondent, Bell, was represented at a hearing on his coram nobis petition by retained counsel, the Honorable Peter A. Hall, following several continuances, on January 28, 1965, and denied. Thereafter certain other motions were filed with the trial court by Bell and duly ruled upon. See certificate of Mr. C. E. Rentz dated January 5, 1966, and as printed as Exhibit "H", infra, pp. 26-30.

Neither the respondent or his retained counsel ever requested that a transcript of these proceedings be prepared or made up for the purposes of an appeal to the Appellate Courts of Alabama. See Exhibit "H", infra. pp. 30. The respondent, Bell, did file a petition on July 21, 1965, in the United States District Court for the Southern District of Alabama, for habeas corpus, and this was dismissed by an order of that Honorable Court on July 26, 1965, without calling upon the State for a reply. See Exhibit "A", infra. pp. 11-12. The United States District Court then denied a motion for leave to appeal in forma pauperis on, August 31, 1965. See Exhibit "B", infra, pp. 12-13. The United States Court of Appeals for the Fifth Circuit did enter an order, dated November 2, 1965, granting a certificate of probable cause for the allowance of the instant appeal in forma pauperis. See Exhibit "C", infra, pp. 13.

While these proceedings were pending the respondent, Cecal Bell, did file a second petition for writ of error coram nobis on September 13, 1965, in the Circuit Court of Marengo County, Alabama, and this was denied on February 9, 1966. See a copy of the letter to the Alabama Attorney General from the United States Court of Appeals for the Fifth Circuit, Clerk's Office, dated July 27, 1966, a copy of same being designated as Exhibit "J" and printed herein, infra, pp. 33. The reply to same from the Office of the Alabama Attorney General is designated as Exhibit "K", and the letter from the Honorable Thomas H.

Boggs, District Attorney, dated August 1, 1965, is designated as Exhibit "L". No effort was ever made in connection with the second coram nobis proceeding to obtain a transcript of the first coram nobis proceeding nor was any effort made to appeal this second coram nobis proceeding to the Appellate Courts of the State of Alabama. See Exhibits "J" through "L", infra, pp. 33-37.

The United States Court of Appeals for the Fifth Circuit did enter an order and judgment reversing the United States District Court by an opinion dated September 29, 1966. See Exhibit "D", infra, pp. 14-22.

Because the United States Court of Appeals for the Fifth Circuit did state in its opinion, that it *must accept as true, certain allegations* of Bell, affidavits were filed with that Honorable Court as a part of the petition for rehearing, *particularly* since that Honorable Court had *requested certain information of State Officials*, the United States District Court having denied the petition for writ of habeas corpus, without calling upon the State of Alabama or Mr. N. L. Hale, Warden, for a reply. These affidavits are printed as exhibits to this petition for writ of certiorari as Exhibits "G", "I", "M", "N", "O", and "P", infra, pp. 24-41. The United States Court of Appeals for the Fifth Circuit did deny rehearing by an order dated November 1, 1966, and did decline to consider these affidavits. See Exhibit "E", infra, pp. 23.

The United States Court of Appeals for the Fifth Circuit did grant a stay of the order and judgment and mandate in the case at bar, in order that this petition for writ of certiorari may be presented to this Honorable Court. See Exhibit "F", infra, pp. 24.

REASONS FOR GRANTING THE WRIT

1. The order of the United States District Court for the Southern District of Alabama denying habeas corpus is dated July 26, 1965. The State of Alabama contends that the respondent, Bell, had six (6) months from the denial of his petition for writ of error coram nobis, this order being dated January

28, 1965, in which to make a request in the trial court for a transcript of his coram nobis proceedings in order to obtain Appellate review under *Keeton v. State,* 278 Ala. 81, 175 So. 2d 774, hence this appeal period had not expired as of the time the District Court denied habeas corpus, hence there has been no exhaustion of State remedies in the case at bar under *Keeton v. State,* supra, or *Key v. Holman,* 346 Fed. 2d 153. If the opinion of the United States Court of Appeals for the Fifth Circuit, in the case at bar is allowed to stand unchanged, the period for perfecting an appeal from coram nobis or other post conviction proceedings will be *abbreviated* contrary to the opinion of the Supreme Court of Alabama in *Keeton v. State,* 278 Ala. 81, 175 So. 2d 774. Further, it will be extremely difficult to determine when an appeal period will be allowed to run, and when it will not be allowed to run, all as provided for under the provisions of Title 28, Section 2254, United States Code, before the acceptance of jurisdiction by the District Court. These problems need clarification, and the opinion of the United States Court of Appeals for the Fifth Circuit is submitted, in this respect, to be in error.

2. It is further most respectfully submitted, that the opinion of the United States Court of Appeals for the Fifth Circuit dated September 29, 1966, see Appendix "D", does fail to take into account or allow a presumption of correctness of the State Court proceedings and determinations, contrary to the opinion of this Honorable Court in *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770. The statement by the United States Court of Appeals for the Fifth Circuit in its opinion that it must accept as true the allegations made by Bell in the pleadings filed in the Fifth Circuit, is submitted to be error, and contrary to *Townsend v. Sain,* supra.

3. A further basis for granting the writ, it is most respectfully submitted, is to clarify the question of a deliberate by-pass rule, concerning orderly State procedure, as setout in the opinion of this Honorable Court, in *Fay v. Noia,* 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 2d 837, particularly since the respondent, *Bell, was represented by retained counsel in his coram nobis proceedings,* as to whether or no *some action should be taken* by either a petitioner or his counsel to review the proceedings in

the Appellate Courts of Alabama, all as a condition precedent to exhausting State remedies under Title 28, Section 2254, United States Code.

4. It is further most respectfully submitted, that the opinion of the United States Court of Appeals for the Fifth Circuit, in the case at bar, see Appendix "D", does remove from the United States District Judge the discretion *following the exhaustion of State remedies*, of whether or no an additional plenary hearing must be held under *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770, or may the United States District Judge rely upon the State Court records and affidavits in the case at bar. The State of Alabama contends that these records are entitled to a presumption of correctness and may afford a legitimate basis for affirmance by the District Court and the Appellate Courts.

5. The State of Alabama further contends that the record in the case at bar, affirmatively reflects that the respondent, Bell, was fully advised of his right to remain silent, and that any statement made could be used in evidence against him, hence in relying upon the State Court record could not the District Court and the Appellate Court determine that there was no "coerced confession" pursuant to *Edwards v. Holman*, 342 Fed. 2d 679, cert. den., *Edwards v. Holman*, June 20, 1966, _____ U.S. _____, _____ S.Ct. _____, 16 L.Ed. 2d 1039.

6. It is further most respectfully submitted, that the record in the case at bar shows that the petitioner was represented by experienced, court appointed counsel at the time of his original arraignment and trial, and that this attorney, Mr. Drinkard, did make every effort to effect a fair and reasonable settlement of the charges against his client. It is further most respectfully submitted, that the District Court and the United States Court of Appeals for the Fifth Circuit should rely upon the State Court record, and determine that respondent, Bell, was thoroughly and competently represented in that respect at the time of his original trial, and further that five cases against Bell were dismissed, and guilty pleas were taken in the other five cases, and that intelligent guilty pleas were here made, and that such therefore precludes going back into

the issue of an alleged coerced confession. See *Busby v. Holman*, 356 Fed. 2d 75, and *Cooper v. Holman*, 356 Fed. 2d 82.

In brief, the State of Alabama contends that the Federal Courts should rely upon the State Court records, as shown by the affidavits as attached hereto, and made a part hereof, see infra, pp. 24-41, and that habeas corpus relief should be denied in the case at bar because of (1) no exhaustion of State remedies; (2) deliberate by-pass of orderly State procedure; and (3) that these matters were thoroughly inquired into by the State trial court and determined to be utterly without merit, hence relief in the case at bar should be denied, and the Circuit Court of Marengo County, Alabama, affirmed in all respects.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

RICHMOND M. FLOWERS
Attorney General of the
State of Alabama

JOHN C. TYSON, III
Assistant Attorney General
of the State of Alabama
ATTORNEYS FOR PETITIONERS

CERTIFICATE

This is to certify that I, John C. Tyson, III, one of the attorneys for the petitioners, and a member of the Bar of the Supreme Court of the United States, prior to filing, served two copies of the foregoing Petition for Writ of Certiorari of the Petitioners, on Mr. Cecal Bell, respondent, c/o Mr. N. L. Hale, Warden, Atmore State Prison Farm, Atmore, Alabama, by mailing them in a properly addressed envelope, with first class

postage prepaid, in the United States mail, on the 16th day of December, 1966.

JOHN C. TYSON, III
Assistant Attorney General
of the State of Alabama

State Capitol
Montgomery, Alabama 36104

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA.

CECAL BELL	)	
Petitioner,	)	
vs.	)	CIVIL ACTION NO. 3799-65.
STATE OF ALABAMA,	)	
Respondent.	)	

This cause comes on to be heard on Petition for Writ of Habeas Corpus, filed on July 21, 1965, by the Petitioner, CECAL BELL.

Now, after consideration thereof, it is

ORDERED and ADJUDGED by the Court that the Petition for Writ of Habeas Corpus filed by the Petitioner, CECAL BELL, is hereby DENIED, and this cause is hereby DISMISSED.

No costs taxed in this matter.

DONE at Mobile, Alabama, this the 26 day of July, 1965.

DANIEL H. THOMAS
United States District Judge.

U.S. DISTRCIT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
26 DAY OF JULY, 1965
MINUTE ENTRY NO. 18822
WILLIAM J. O'CONNOR, CLERK,
BY—WILLIAM E. TAYLOR
DEPUTY CLERK.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA.

CECAL BELL, Petitioner,	)	
vs.	)	CIVIL ACTION NO. 3799-65.
STATE OF ALABAMA Respondent.	)	

ORDER DENYING LEAVE TO APPEAL IN FORMA PAUPERIS FROM ORDER DENYING WRIT OF HABEAS CORPUS AND ORDER DISMISSING CAUSE DATED JULY 26, 1965.

This cause coming on to be heard upon the motion and affidavit of the Petitioner, CECAL BELL, for leave to prosecute his appeal herein in *forma pauperis;* and the matter having been heard and considered by the Court;

The Court being of the opinion that the appeal is not meritorious, it is, therefore, ORDERED, ADJUDGED and DECREED that the motion for leave to prosecute appeal in forma pauperis be and the same hereby is DENIED.

DONE at Mobile, Alabama, this the 31st day of August, 1965.

DANIEL H. THOMAS
United States District Judge.

U.S. DISTRICT COURT
SOU. DIST. ALA
FILED AND ENTERED THIS THE
31ST DAY OF AUGUST, 1965
MINUTE ENTRY NO. 18959
WILLIAM J. O'CONNOR, CLERK,
BY—WILLIAM E. TAYLOR
DEPUTY CLERK.

APPENDIX "C"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Misc. No. 308

CECAL BELL,

Petitioner

versus

STATE OF ALABAMA

Respondent

Before MARIS, Senior Judge* and RIVES and BELL, Circuit Judges.

By the Court:—

Issuance of a Certificate of Probable Cause for allowance of this appeal in forma papueris on the Application filed by Petitioner on October 18, 1965, in the above entitled and numbered cause is hereby GRANTED.

ORIGINAL FILED: NOVEMBER 2, 1965.

*Of the Third Circuit, Sitting by Designation.

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 23104

CECAL BELL

Appellant,

versus

STATE OF ALABAMA

Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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(September 29, 1966.)

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and KILKENNY,* District Judge.

TUTTLE, Chief Judge: The appellant Cecal Bell, acting as his own counsel, filed a petition for writ of habeas corpus in the United States District Court of Southern Alabama, seeking release from an Alabama state prison where he is confined under a sentence for grand larceny. The district court denied the petition without calling for a return and without a hearing. No reasons for the denial were assigned. Subsequently, the district court also denied a motion for leave to appeal *in forma pauperis*. This Court then granted issuance of a certificate of probable cause allowing prosecution of the appeal *in forma pauperis*, to review the propriety of the district court's summary dismissal of appellant's petition. We conclude that, although the dismissal was not improper when made, we must now reverse and remand this cause for further proceedings.

---

*Of Portland, Oregon, sitting by designation.

An exhaustive statement of the allegations appearing in the petition is not necessary to the disposition of this appeal. An understanding of the nature of the federal questions presented can be gleaned from the following summary of the facts alleged. Appellant was arrested on suspicion of a series of cattle thefts on October 22nd, 1961. Two days later, the investigating officers approached Bell and demanded that he admit guilt to the charges. Being unaware of his legal rights, he became frightened, admitted guilt, and was immediately taken to the office of the Clerk of the Court, where he was ordered to sign a confession.

Three weeks later, on November 13th, 1961, appellant was contacted by an attorney who told Bell that he had been employed to represent him; that he could not defend him because of his previous plea of guilty; but that negotiations had been arranged with the solicitor and the trial judge to sentence him to 25 years imprisonment with an early parole date. On November 16th, 1961, three days later, appellant was convicted and sentenced to five consecutive terms of five years each, a total of twenty-five years imprisonment, for grand larceny of cattle.[1] His account of the proceeding is that he was "brought to the Marengo County courtroom, seated with his attorney . . . each member of the jury was introduced and petitioner was immediately sentenced to twenty-five years imprisonment."[2] He avers that "his counsel was so lacking in diligence and competence that he was actually without representation," and that the transcript of his trial would verify his allegations.

---

[1] It may be appropriate to state that although this court has no power to review either federal or state court sentences, imposed within legal limits, the **apparent** severity of a 25 year sentence for five cases of cattle stealing is a circumstance that lends credibility to his contention that the plea of guilty was made after a promise of early parole.

[2] Although the petition is not clear on the point, information submitted at this Court's request by state authorities indicates that Bell pleaded guilty to the charges against him and was convicted on the basis of his guilty plea rather than after trial. His description of the proceeding at which he was convicted certainly tends to confirm this account. However, there is nothing in the record before us which reveals when appellant's plea was made, or sheds any light on the circumstances surrounding its making.

These allegations of the appellant concerning his legal representation and the voluntariness of his confession may be baseless. However, in determining whether his petition may properly be dismissed without calling for a return and without a hearing, we are obliged to treat them as true. *House v. Mayo,* 324 U.S. 42, 45 (1945). On that assumption, we must determine whether the facts alleged amount to a taking of liberty without due process of law. In doing so, we must be mindful of the fact that appellant was without benefit of counsel in preparing his petition. The Supreme Court has said of such cases:

> Prisoners are often unlearned in the law and unfamiliar with the complicated rules of pleading. Since they act so often as their own counsel in habeas corpus proceedings, we cannot impose on them the same high standards of the legal art which we might place on the members of the legal profession. *Price v. Johnson,* 334 U.S. 266, 292 (1948).

We turn first to the voluntariness of appellant's confession. As we have noted, it is not entirely clear whether appellant's conviction was based on a plea or a verdict of guilty. More likely, it was a plea, and we will so assume for the purpose of this discussion. Even so, the voluntariness of the confession is the critical issue, for the averments of the petition clearly indicate a casual relationship between the allegedly coerced confession and the subsequent plea of guilty. Of such cases, the Supreme Court has said, "Our prior decisions have established that: (1) a conviction following trial *or on a plea of guilty* based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause . . . ." *Herman v. Claudy,* 350 U.S. 116, 118 (1965). (Emphasis added.) Citing *Herman,* the Court of Appeals for the Fourth Circuit has said:

> The claim [that a coerced confession induced a guilty plea] may properly be raised on habeas corpus, and if it is proved at the hearing that an illegally obtained confession induced the plea of guilty, the conviction should be set aside unless there has been a voluntary waiver. *Jones v. Cunningham,* 297 F.2d 851, 855 (4th Cir. 1962).

Thus the question is whether appellant has alleged any violation of federal constitutional safeguards in the obtaining of his confession. Reliance on the principles established in *Escobedo v. Illinois,* 378 U.S. 478 (1964), and *Miranda v. Arizona,* 384 U.S. 436, (1966), is precluded by the Supreme Court's holding in *Johnson v. New Jersey,* 384 U.S. 719, (1966), that these decisions will not be retroactively applied to cases such as this one in which the trial began before the respective dates of those decisions. But this in no way affects the duty of the district court to consider a claim that a confession was obtained under circumstances which render it involuntary. In *Davis v. North Carolina,* 384 U.S. 737, (1966), decided one week after *Miranda,* the Court said:

> The review of voluntariness in cases in which the trial was held prior to our decisions in *Escobedo* and *Miranda* is not limited in any manner by these decisions. On the contrary, the fact that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda,* is a significant factor in considering the the voluntariness of statements later made. *Id.* at 740.

And since the decision in *Malloy v. Hogan,* 378 U.S. 1, (1946), the test to be applied in both state and federal prosecutions is "Whether the confession was 'free and voluntary: that is [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . . .'" *Id.* at 7. The petition states that the investigating officers *demanded* a confession, that appellant became frightened and admitted guilt, and that he was then *ordered* to sign a confession. Surely there are circumstances under which demands and orders that a confession be given may amount to "the exertion of any improper influence."

Considering next the allegations that appellant did not receive the effective assistance of counsel, the applicable test is stated in *Williams v. Beto,* 354 F.2d 698 (5th Cir. 1965):

> It is the general rule that relief from a final conviction on the ground of incompetent or ineffective counsel will

be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or *the purported representation was only perfunctory*, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation. *Id.* at 704. (Emphasis added.)

It is clear that this test applies to cases in which counsel is retained by or for an accused as well as to cases in which counsel is appointed to represent an indigent defendant. *Scott v. United States*, 334 F.2d 72 (6th Cir. 1964). Contentions strikingly similar to those made here were presented in *Jones v. Cunningham*, 297 F.2d 851 (4th Cir. 1962). A state prisoner alleged in his habeas corpus petition that his assigned counsel had entered the case only after he had entered a plea of guilty; that the plea had followed a coerced confession; and that counsel had advised prisoner there was nothing he could do for him since he had already made a confession. In reversing the district court's dismissal of the petition, the court said:

> "Especially striking is the petitioner's assertion that the court-appointed lawyer, after the most superficial contact with the case and without making inquiry into the circumstances, counselled surrender because the defendant had given a confession—a confession allegedly made under stress and coercion. No legal representation is worthy of the name if the lawyer makes no investigation of the background of the client's plea . . . or of the extrajudicial confession which induced the plea. Id. at 855." (Footnote omitted.)

We agree with this statement, and in our view the principle it embodies entitled Bell to have his claim concerning his representation considered. In the case at bar, the allegations made in the petition are highly conclusory in nature and leave much to be desired in the way of factual allegations to support the contentions made. However, bearing in mind the Supreme Court's admonition that such petitions prepared without the aid of counsel must be liberally construed, we conclude that appellant's petition is not so devoid of factual allegations in support

of the substantial constitutional issues which it seeks to raise as to warrant the district court's summary dismissal of it.

There remains for consideration the question whether appellant has exhausted his state remedies within the meaning of 28 U.S.C. §2254. At the outset, two principles should be reiterated. First, the exhaustion principle is one of comity, not jurisdiction, which is conferred by the allegation of an unconstitutional restraint. *Whippler v. Balkcom,* 342 F.2d 388, 390 (5th Cir. 1965). Second, under the Supreme Court's decision in *Fay v. Noia,* the only remedies which must be exhausted are those effective state remedies which are presently available, unless the habeas applicant has deliberately bypassed his state remedies. *Cobb v. Balkcom,* 339 F.2d 95, 99-100, (5th Cir. 1964). There is no contention that appellant has done so in this case.

A chronological account of Bell's various attempts to utilize his state remedies is given in the margin.[3] According to re-

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[3] The record from the District Court offers little information pertinent to this question. However, at the request of this court, information has been supplied by state officials which relates the following sequence of events. No appeal was taken from the original conviction. On January 7, 1964, a petition for writ of error **coram nobis** was filed in the Circuit Court of Marengo County, Alabama. After a hearing at which appellant was represented by an attorney retained for him by his family, the petition was denied on January 28, 1965. On April 17, 1965, appellant filed with the same court a motion to modify or reduce the sentence imposed. On June 14th, 1965, appellant filed a request for copies of the court's records, "for the purpose of compelling an accurate and acceptable writ of error **coram nobis** and/or habeas corpus within a court of jurisdiction. A pauper's oath was filed with this request. On July 9, 1965, the motion for reduction or modification was denied on the ground that the court was without jurisdiction to change or modify this sentence because more than thirty days had elapsed since the original sentence was imposed, and on the ground that the motion was without merit. On the same day, the court denied appellant's request for records on the ground that it did not believe that he was an indigent person, and on the ground that all records in his case were furnished to him in open court on his petition for writ of error **coram nobis.** On July 21, 1965, this petition for a writ of habeas corpus was filed in the United States District Court for the Southern District of Alabama. The District Court dismissed the petition on July 26, 1965, and denied a

sponses from state officials to our inquiries, the issues of involuntary confession and inadequate attorney were presented (along with other issues) to a state trial court in appellant's first *coram nobis* proceeding, and denied after an evidentiary hearing on the merits of the claims. No phase of the legal proceedings concerning appellant's conviction or his several attempts to secure post-conviction relief has been presented to the appellate courts of Alabama.

Under Alabama law, an appeal from a criminal conviction must be taken within six months. Code of Ala., Title 15, Section 368. Since appellant's conviction occurred in 1961, that remedy was obviously not available to him at the time he filed his petition in the District Court. A denial of a petition for *coram nobis* relief may be appealed in Alabama. *Ex parte Keene,* 153 So.2d 631 (Ala. 1963). Here again, the appeal must be taken within six months, and "the matters adjudicated on hearing of a *coram nobis* application are *quasi res judicata,* i e, repeated applications or petitions merely resting on the same allegations should not be entertained." *Allen v. State,* 150 So.2d 399, 401 (Ala. App. 1963).

We are convinced that appellant is now, and has been since the lapse of six months from the denial of his first petition for *coram nobis* relief on January 28, 1965, entirely without any effective remedy in the courts of Alabama. The right of appeal is considered a creature of statute in Alabama, and the statutes granting it are strictly construed. The insistence of the appellate courts of that state upon meticulous observance of procedural niceties (including time limits) in the taking of appeals is well demonstrated in *Albert v. State,* 157 So.2d 199 (Ala. 1962), and

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motion for leave to appeal in forma pauperis on August 31, 1965. On September 13, 1965, a second petition for writ of error coram nobis was filed by appellant in the Circuit Court of Marengo County, Alabama. On November 2, 1965, this court granted the issuance of a certificate of probable cause for allowance of this appeal in forma pauperis. On February 9, 1966, appellant's second petition for writ of error coram nobis was denied, apparently on the ground that all of the allegations contained therein had been fully inquired into in the first such petition.

Relf v. State, 99 So.2d 216, (Ala. 1957).[4] The only remedy to which strict time limits are inapplicable is the writ of error, and that remedy cannot be used by appellant here to reveiw his original conviction, because the matters complained of lie in proof outside the record. *Ex parte Allison*, 169 So.2d 436 (Ala. 1964). Nor can it be used to review the denial of his *coram nobis* petitions, since it is available only in criminal cases, while *coram nobis* is considered essentially civil in nature. *Ex parte Wilson*, 155 So.2d 611, (Ala. 1963). Thus, it is apparent that once the six month time limit for appealing the denial of Bell's first *coram nobis* petition expired, there was no way to obtain appellate review of the contentions presented therein in the courts of Alabama. Since the findings of such proceedings are *"quasi res judicata"* in Alabama, an appellate court would not reach the merits in an appeal from the denial of a subsequent *coram nobis* petition based on the same grounds alleged in the first. The Court of Appeals of Alabama has indicated that the failure to appeal the first such denial constitutes grounds for refusal of appellate review in subsequent proceedings. *Ex parte Allison*, *supra*, at 437.

The chief difficulty in this case is posed by the fact that the six month period for appeal of the denial of Bell's first *coram nobis* proceeding on January 28, 1965, lacked seven days of expiring on July 21, 1965, when he filed his petition for habeas corpus in the United States District Court. Thus the district court's dismissal of the petition on July 26, 1965, was supportable on the ground that appellant had failed to exhaust available

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[4] A trend away from such strict construction may be indicated by a recent case decided by the Supreme Court of Alabama. As we noted in Key v. Holman, 346 F.2d 153, (5th Cir. 1965), Alabama law provides for a free transcript for a prisoner appealing from a denial of post-conviction relief. The operative statute, Code of Ala., Title 15, Section 380(16) states in pertinent part that the petitioner "may within ten days after a judgment or order disposing of the proceedings adversely to . . . (him) file . . . a similar petition . . . stating the desire of the petitioner to appeal . . . ." In Keeton v. State, 175 So.2d 774, (Ala. 1965), the court held that this ten day period would begin to run only after an appeal had been taken, and that an indigent could perfect his appeal at any time within the normal six months period, even though a strict reading of the statute would dictate otherwise.

state remedies. However, that court's order did not state the grounds for dismissal, and appellant did not perfect an appeal to the Supreme Court of Alabama within the remaining two days of the six month period. Thus we are confronted with the question of what disposition to make of this appeal at this date, when the remedy available at the time appellant's petition was filed no longer exists. This question was not reached in our decision in *Key v. Holman*, 346 F.2d 153, (5th Cir. 1965), upon which the State relies so heavily in its brief.

The principles adverted to at the outset of this discussion are crucial to the solution of this question. If the exhaustion requirement were a jurisdictional prerequisite, we would have no choice but to affirm the district court's dismissal. But it is not. Rather, it is a rule of comity between courts relating to the appropriate exercise of power, and it is not to be applied mechanically. The Supreme Court in *Fay v. Noia* speaks of "remedies still open to the applicant *at the time he files his application for habeas corpus in the federal court.*" *Fay v. Noia*, 372 U.S. 391, 399 (1963) (Emphasis added.) But the rationale of the exhaustion requirements is that state courts should have first opportunity to correct abuses of constitutionally protected rights, within their respective jurisdictions. And since our review of Alabama law clearly indicates that no effective remedy is now available to Bell in the courts of that state, the purpose of the exhaustion principle could not be furthered by affirmance. He is now entitled to have his claims considered by a federal court, and it would be pointless to require him to begin anew his action in the district court. We can see no rational purpose to be served by affirming the district court's summary denial of appellant's petition. Thus we conclude that this cause must be returned to the district court for further proceedings.

Notwithstanding the obvious burden placed on the trial courts of the filing of post-conviction motions, we consider it helpful to suggest that it would be useful for the trial court to include a brief statement of the reason for dismissing a petition for habeas corpus without the hearing contemplated in Title 28, U.S.C.A. §2243.

REVERSED and REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX "E"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 23,104

CECAL BELL,

Appellant,

v.

STATE OF ALABAMA

Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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(November 1, 1966)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and KILKENNY,* District Judge

PER CURIAM:

The petition for rehearing and application for stay are hereby DENIED.

By this Court's order, this case is returned to the District Court for the Southern District of Alabama for a hearing on the petition for habeas corpus. The affidavits that have been attached to this petition for rehearing are not now available for our consideration since they were not part of the record in the District Court, since that Court's dismissal of the application for habeas corpus disposed of the case without a hearing. It is for the trial court, not the Court of Appeals, to consider the factual issues raised by the original petition.

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*Of Portland, Oregon, sitting by designation.

APPENDIX "F"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23,104

CECAL BELL,

Appellant,

versus

STATE OF ALABAMA

Appellee.

Appeal from the United States District Court for the Southern District of Alabama

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ORDER

IT IS ORDERED that the application of appellee for a stay of the opinion, judgment and mandate of this Court until January 1, 1967, pending application for a writ of certiorari, in this cause be, and the same is hereby GRANTED.

ELBERT P. TUTTLE
Chief Judge

APPENDIX "G"

THE STATE OF ALABAMA,
MARENGO COUNTY.

Before me, the undersigned authority in and for said county and state, personally appeared Jno. W. Drinkard, of Linden, Alabama, who after being duly sworn, deposes as follows:

My name is Jno. W. Drinkard and I am a practicing attorney in Linden, Marengo County, Alabama, and a member in good

standing with the Alabama State Bar, I have practiced continuously since 1938, with the exception of thirty-four months which I spent in the United States Army during World War II.

I would estimate, and I believe the court records will affirm, that I have represented a minimum of 75% of the criminal cases in this county, as well as cases in adjoining counties in this State, for the past fifteen years. I can truthfully state that I have never, during my practice, undertaken to represent any client but that I did so diligently, with all the legal knowledge and energy at my command, regardless of race, color, or creed.

I defended Cecal Bell, who was indicted for several cases of Larceny or Theft of Cattle in this county, in the November Term og 1961. When I was first approached by some of the defendant's brothers, before the trial of this case, and satisfactory fee arrangements were made, I, in the company of one of his brothers, soon thereafter, conferred with Cecal, while he was incarcerated in the Jail in Linden, Alabama. As I recall the facts, Cecal told me he had signed a confession, admitting his part in these thefts. There were some two or three of his friends involved in these thefts with him. I conferred with each of them separately and they each told me, in detail, of their participation in these thefts. Subsequent to this, and before the trial of the case, I went to Thomaston, Alabama, a town about fourteen miles from Linden, where Cecal was well known, and interviewed several people about his character and reputation. As I further recall, not a single person I interviewed would speak a good word for him.

I then went back and talked with Cecal and asked him the specific question of why he had confessed. At this time I do not recall his exact statement, but I do know that he did not tell me that anyone had offered him any short terms or any inducement to sign the confession, or had threatened him in any manner whatsoever.

Now, I do not know what experience any Judge who might read this might have had in defending criminal cases, but I say with all respect in the world that if he is worth his salt, under the circumstances with which I was faced, and if he had his

client's interest at heart, he would begin trying to negotiate and trade for the best settlement possible under the circumstances. My investigation revealed that these defendants had what I would term as a "Cattle Theft Ring," and that Cecal was the leader. They had their own transportation, ropes and other necessary equipment with which to capture the cattle and would go out in advance and "case the job," so to speak. It is my firm opinion that had I gone to trial on these cases, Cecal would have received many more than five years in each case.

JNO. W. DRINKARD

SWORN TO AND SUBSCRIBED before me this 7th day of October, 1966.

HERMIONE VICK
Notary Public, Marengo County, Alabama

APPENDIX "H"

Linden, Alabama
January 5, 1966

Hon. Edward W. Wadsworth
Clerk of U.S. Court of Appeals
5th U.S. Circuit
P.O. Box 30120
New Orleans, La. 70130

Re: Writ of Error Coram Nobis
Your Case No. 23104
Cecal Bell vs. State of Alabama
Our No. 5380-5381
5382-5383
5384

Dear Hon. Wadsworth:

At the request of Hon. John C. Tyson, Assistant Attorney General, of the State of Alabama I list below the papers filed in the above stated cause on Writ of Error Coram Nobis.

The file in this case was badly burned from the fire which destroyed the courthouse on Oct. 14, 1965, in Linden, Marengo County, Alabama, however they can be read and I list the papers which are all the papers in the file and will attempt to give to you the main contents of each paper in order filed.

(a) Jan. 7, 1964. Petition for Writ of Error Coram Nobis filed.

(b) Jan. 17, 1964. Amendment to petition filed.

(c) Jan. 27, 1964. Motion by Solicitor T. H. Boggs to dismiss petition for writ of error coram nobis.

(d) Feb. 2, 1964. Letter to Clerk of Court from Cecal Bell requesting information as to when his case was to be set so he could furnish list of witnesses needed.

(e) Feb. 7, 1964. Motion of petitioner to dismiss Solicitor T. H. Boggs motion to dismiss petition for writ of error coram nobis.

(f) Mar. 13, 1964. Letter from Clerk of Court advising Cecal Bell that his hearing on petition for writ of error coram nobis was set for Friday, April 3, 1964, at 9:00 A. M. and to furnish clerk with any names of witnesses he wish summoned.

(g) Mar. 30, 1964. Letter from Cecal Bell to Clerk of Court listing witnesses he wanted summoned.

(h) Mar. 31, 1964. Summons for witnesses issued.

(i) April 3, 1964. Case continued this date at request of defendant.

(j) Oct. 17, 1964. Letter to Clerk of Court from Cecal Bell stating that his family had employed Peter A. Hall for his April 3, 1964 hearing, stating that, "This attorney Peter A. Hall received $300.00 from my family and all I can see that he has done is to prevent me from having my hearing. He, Mr. Hall has informed me that my hearing will be held when he receives his fee. I have

informed Mr. Hall that I intend to prosecute the matter myself and asked that he return my papers that he borrowed."

(k) Oct. 29, 1964. Letter from Clerk of Court to Hon. Peter A. Hall advising him that the court had set Friday Dec. 4, 1964, at 9:00 A. M. at Linden, Alabama for hearing Bell's petition for writ of error coram nobis.

(l) Nov. 24, 1964. List of witnesses to be summoned for Dec. 4, 1964 received from Hon. Peter A. Hall.

(m) Nov. 25, 1964. Said summons requested were issued.

(n) Dec. 4, 1964. Amendment to petition on writ of error coram nobis filed.

(o) Dec. 4, 1964. Petition for writ of error coram nobis partially heard and the court continued said hearing to Jan. 28, 1965, at 10:00 A. M. at Linden, Alabama.

(p) Jan. 20, 1965. Letter from Hon. Peter A. Hall giving list of witnesses to be summoned for Jan. 28, 1965.

(q) Jan. 20, 1965. Summons for said witnesses issued.

(r) Jan. 28, 1965. Order of court after hearing evidence on petition for writ of error coram nobis overruled and denied petitioners writ of error coram nobis.

(s) Apr. 17, 1965. Motion filed from Cecal Bell to have court modify or reduce sentence imposed.

(t) May 21, 1965. Letter from Cecal Bell to clerk of court requiring what action had been taken on his request of April 17, 1965.

(u) Jun. 14, 1965. Petition filed by Cecal Bell requesting complete copies of court records for the purpose of compelling an acturate and acceptable writ of error coram nobis and or Habeas Corpus within a court of jurisdiction, filing with said petition paupers oath.

(v) Jun. 15, 1965. Motion filed by Solicitor, T. H. Boggs to dismiss petition of Cecal Bell on grounds that Hon. Peter A. Hall represented Cecal Bell on writ of error

coram nobis, who had him employed by petitioner, and that said files were made available at the hearings and much of said files were furnished his attorney, and said matters are therefore res judicata.

Also that the allegations that petitioner is a pauper is questionable as Cecal Bell was represented at the original trial by Hon. Jno. W. Drinkard, a practicing attorney, who was employed at that time by Cecal Bell, and was represented on hearing for petition of writ of error coram nobis by Hon. Peter A. Hall, a practicing attorney, who was also employed by petitioner.

(w) July 9, 1965. Petitioners petition for reduction or modification of his sentence was overruled and denied on grounds that more than thirty days had elapsed since original sentence, therefore the court had no jurisdiction to charge or modify said sentence, and that said petition was with out merit.

(x) July 9, 1965. The court overruled and denied petitioners motion for certain records pertaining to his commitment from sentence of this court on Nov. 16, 1961, and petitioner alleging that his is an indigent person and unable to pay the costs thereof, for it appearing to the court that defendant is not an indigent person; that he was represented in original trial by Hon. Jno. W. Drinkard, a practicing attorney at the Marengo County Bar, and on his hearing see petition for writ of error coram nobis by Hon. Peter A. Hall, a practicing attorney of Birmingham, Alabama, and further that all records in his case were furnished to him in open court on his petition for writ of error coram nobis.

(y) Sept. 13, 1965. Petition for writ of error coram nobis filed.

(z) Jan. 5, 1966. Motion of Solicitor to dismiss petition filed on Sept. 13, 1965 by Cecal Bell as this is a repitition of petition previously filed setting forth the same grounds as before.

Also that the matter is now res-judicata.

(a-1) No ruling on said petition as motion to date.

All the above is true and correct resuma of all papers filed in this case to the best of the Clerk's ability.

Even though the trial docket sheet was destroyed by fire as before stated the Clerk of the Court has reason to believe that defendant was represented on arraignment by Atty. Jno. W. Drinkard, and at no time has Cecal Bell ever made motion for an appeal in this or any other cases.

Respectfully submitted,
C. E. RENTZ
Clerk Circuit Court
Marengo County, Alabama

CER/mjy
COPY: Hon. John C. Tyson,
Assistant Attorney General
State of Alabama

APPENDIX "I"

Before me, the undersigned authority in and for said county and state personally appeared C. E. Rentz, as Clerk of the Circuit Court, Marengo County, Alabama, being duly sworn deposes and saith:

My name is C. E. Rentz, and I am Clerk of the Circuit Court of Marengo County, Alabama, and have been since July 1, 1946.

As Clerk of the Circuit Court of Marengo County, Alabama, I attended the trial of Cecal Bell on November 16, 1966 wherein he, Cecal Bell had been indicted by the Grand Jury of Marengo County, Alabama, on the following charges, being case numbers and styled as follows:

Case No. 5380, State of Alabama Vs. Cecal Bell, Charge, Grand Larceny.

Case No. 5381, State of Alabama Vs. Cecal Bell, Charge, Grand Larceny.

Case No. 5382, State of Alabama Vs. Cecal Bell, Charge, Grand Larceny.

Case No. 5383, State of Alabama Vs. Cecal Bell, Charge, Grand Larceny.

Case No. 5384, State of Alabama Vs. Cecal Bell, Charge, Grand Larceny.

At said Court on November 16, 1966 the above cases were called for trial at which time the Hon. Jno. W. Drinkard was representing the defendant and the Hon. T. H. Boggs, who prosecutes for the state were present and the Hon. Emmett F. Hildreth, as Judge of the 17th Judicial Circuit of Alabama, was the presiding Judge, and the defendant Cecal Bell was in Court.

I do not recall if a jury had been selected for the trial of the cases of Cecal Bell or not, when the Hon. Jno. W. Drinkard obtained the written confessions of said defendant, Cecal Bell, from Sheriff T. W. Shields. As I recall the Hon. Jno. W. Drinkard upon obtaining the confessions from the Sheriff, T. W. Shields, after reading them over, turned to defendant; Cecal Bell, stated that he made them and that they were true and correct.

It was at this time that the defendant Cecal Bell's attorney, the Hon. Jno. W. Drinkard, discussed with Cecal Bell the issues involved and Cecal Bell did plead guilty and received a sentence upon his plea of guilty of five years in each of the said five cases or a total of twenty five years.

As Clerk of the Circuit Court of Marengo County, Alabama, I also am charged with the responsibilities of keeping all of the records in the Circuit Court of Marengo County, Alabama which also includes any and all petitions for writ of Error Coram Nobis filed in said Court.

I did receive a petition for Writ of Error Coram Nobis from Cecal Bell. I did receive and file a petition for Writ of Error Coram Nobis from Cecal Bell. Said hearing on said petition was held with the Hon. Peter A. Hall, Negro practicing attorney of Birmingham, Alabama representing the petition, Cecal Bell.

The petitioner, Cecal Bell while on the witness stand stated that the allegations contained in his petition as to being forced to give the confessions, and admitting that they were correct, because his lawyer, the Hon. Jno. W. Drinkard had informed him that if he didn't plea guilty, he would possibly receive fifty years in the penitentiary if he went to trial, was not true. That he didn't prepare the petition and he didn't know that such was alleged in the petition even though he signed said petition. He stated from the witness stand that he did sign the confession voluntarily with a knowledge of its contents.

I, C. E. Rentz, as Clerk of the Circuit Court of Marengo County, Alabama, hereby swear that I was in the courtroom during the entire time of the hearing on the petition of the Writ of Error Coram Nobis of petitioner, Cecal Bell, and that the foregoing statements are true and correct to the best of my knowledge.

C. E. RENTZ,
as Clerk of the Circuit Court
Marengo County
Alabama.

Sworn to and subscribed before me on this the 7th day of October, 1966.

DOROTHY AYDELOTT
Notary Public.

APPENDIX "J"

UNITED STATES COURT OF APPEALS

Fifth Circuit
Office of the Clerk
July 27, 1966

Edward W. Wadsworth
Clerk

Room 408 - 400 Royal St.
New Orleans, La. 70130

Honorable Richmond Flowers
Attorney General
State of Alabama
State Office Building
Montgomery, Alabama

RE: NO. 23104—Cecal Bell v. State of Alabama

Dear Mr. Flowers:

In your brief filed in this case in January 1966, you stated that there was now pending in the Circuit Court for Marengo County, Alabama, an application for a writ of *coram nobis* on behalf of this prisoner. In order that the Court may have the current status with respect to the matter, will you kindly inform me whether the case has now been disposed of, and, if so, what disposition was made of it by the Circuit Court.

Will you also kindly include a memorandum stating whether all matters which were incorporated in the original *habeas corpus* filed in the United States District Court for the Southern District of Alabama can be reached in the pending *coram nobis* proceedings, if they are still pending in the Alabama Courts.

Sincerely yours,
EDWARD W. WADSWORTH
Clerk
By: Gilbert F. Ganucheau
Chief Deputy Clerk

ec: Mr. Cecal Bell
Route 2, Box 38
Atmore, Alabama

APPENDIX "K"

July 29, 1966

Honorable Thomas H. Boggs
District Attorney
Courthouse
Linden, Alabama

Re: United States Fifth Circuit
No. 23104, Cecal Bell vs.
State of Alabama

Dear Tom:

As you know, the United States Fifth Circuit several months ago, allowed Cecal Bell to proceed in forma pauperis from an order in the United States District Court in Mobile denying habeas corpus. As you will further recall our office filed a brief in the United States Fifth Circuit pointing out that the petitioner has not as yet exhausted his State remedies within the provisions of Title 28, Section 2254, United States Code, hence Judge Thomas properly denied habeas corpus.

Enclosed herewith is a xerox copy of a letter dated July 27, 1966, from the office of the Clerk of the United States Fifth Circuit inquiring as to the current status of the coram nobis proceedings pending in the Circuit Court of Marengo County, Alabama.

As you know, of course, coram nobis petitions are handled in the trial court by the office of the District Attorney, so we do not always have current information as to the status of a given case. With this in mind, please advise Mr. Wadsworth of the current status of the coram nobis proceedings, and further, as to the nature of the allegations made in Marengo County, Alabama.

It might be helpful if the Circuit Clerk could xerox copies of the coram nobis petitions which have been filed and the order and judgment denying same, and include these with the letter to the United States Fifth Circuit.

Also please send us a copy of same for our files.

Thanking you for your attention to this, and with best wishes, I am

Sincerely yours,

RICHMOND M. FLOWERS
Attorney General

By—
JOHN C. TYSON, III
Assistant Attorney General

Enclosure

cc: Honorable Edward W. Wadsworth
Clerk,
United States Court of Appeals
for the Fifth Circuit
P.O. Box 30120
New Orleans, Louisiana 70130

APPENDIX "L"

THOMAS H. BOGGS
District Attorney
17th Judicial Circuit
Linden, Alabama

August 1, 1966

Greene, Marengo and
Sumter Counties

Office Telephone 2651
Residence Telephone 4801

Mr. Gilbert F. Ganucheau
Chief Deputy Clerk
United States Court of Appeals
Fifth Circuit
New Orleans, La.

Re: No. 23104—Cecal Bell v. State of Alabama

Dear Sir:—

Your letter of July 27, 1966, addressed to Honorable Richmond Flowers, Alabama Attorney General, has been referred to the writer for handling.

Subject with his employed attorney, Hon. Jno. W. Drinkard of Linden, Alabama, after consultation, I understand, with his brother of Washington, D. C., plead guilty and was sentenced for stealing a large number of cattle in Marengo County. He thereafter employed Hon. Peter A. Hall, a Negro attorney of 1630 Fourth Avenue, North, Birmingham, Alabama, and a writ of error coram nobis proceeding was held before Judge Emmett F. Hildreth here in Linden; thereafter another writ of error coram nobis was filed by subject, which was also denied by Judge Hildreth. A third such writ was filed and since nothing new was alleged except those matters which heretofore were fully inquired into, this last writ was denied by Judge Hildreth February 9, 1966. I understand copies of these papers were

forwarded to you by our Clerk (or forwarded to the office of the Alabama Attorney General).

In his petitions he set forth about everything which could be alleged, such as exclusion of Negroes on juries, confession obtained by threats, inadequate attorney, etc., which allegations were inquired into by the Court.

If you would like full copies of these files (which bear our numbers 5380-84 of Criminal side of Court), they can be obtained from Hon. Chas. Rentz, Clerk of Circuit Court, Linden, Alabama.

Respectfully yours,

THOMAS H. BOGGS

APPENDIX "M"

Before me, the under signed authority in and for said county and state, personally appeared C. E. Rentz, as Circuit Clerk of the Circuit Court of Marengo County, Alabama, who after being duly sworn, deposes and saith.

I, C. E. Rentz, as Clerk of the Circuit Court of Marengo County, Alabama, did appear before Cecal Bell for the purpose of reading to him certain statements made by him, relative to charges preferred against him in the Circuit Court of Marengo County, Alabama for the theft and sale of numerous head of cattle from several different cattle farmers of the county of Marengo, State of Alabama.

Cecal Bell being alone in the room with me, was duly sworn and advised that I had been asked by the Sheriff of Marengo County, Alabama, T. W. Shields, to read certain statements handed to me by the Sheriff, purported to be statements given to the Sheriff by Cecal Bell as to the charges against him for the theft and sale of cattle.

Cecal Bell having been duly sworn, I told him that the statements of which I was fixing to read to him, could be, and no doubt would be used against him in trial of any case relative to

the charges of the theft and sale of the cattle of which he had been charged with. That if there was any error in the statement or if there was anything in the statement that wasn't correct that I didn't want him to sign same stating that they were true and correct, however that if they were correct and he wanted to sign the statements as being correct statements made by him that he could sign them if he wanted to. I further asked him if he had been threatened or offered any reward of any kind to get him to give to the Sheriff the statements of which I was going to read, that is the statements made by you Cecal Bell to T. W. Shields, Sheriff of Marengo County, Alabama, and he, Cecal Bell, stated that he had not.

I then carefully read aloud the statements to Cecal Bell, and upon completing the reading of the statements, I asked Cecal Bell if they were true and correct statements made by him to the Sheriff, and that if they were, if he wanted to sign same as being correct, and he said they were correct, and that he wanted to sign them.

I handed the statements and my pen to him and he did sign said statements, voluntarily and of his own will.

I, C. E. Rentz as Clerk of the Circuit Court of Marengo County, Alabama hereby swear that the above is true and correct facts of the taking of the statements made by Cecal Bell, and that at no time was there any one in the room during the time, on the above stated occasion except Cecal Bell and me. I further certify that Cecal Bell appeared to be a person of good intelligence.

Witness my hand this the 7th day of October, 1966.

C. E. RENTZ,
as Clerk of the Circuit Court of
Marengo County,
Alabama.

Sworn to and subscribed before me on this the 8th day of October, 1966.

DOROTHY AYDELOTT
Notary Public.

APPENDIX "N"

STATE OF ALABAMA
MARENGO COUNTY.

Before me, the undersigned authority in and for said county and state, personally appeared T. Wilmer Shields, of Linden, Alabama, who after being duly sworn, deposes as follows:

My name is T. Wilmer Shields and I am the Sheriff of Marengo County, Alabama, and have held this office continuously since July 3, 1937.

W. L. Stephens, investigator with the Cattle Theft Division of the State of Alabama Department of Agriculture, and I took the confession of Cecal Bell that is now in the United States Court of Appeals for the Fifth Circuit, No. 23104, Cecal Bell, Appellent, versus State of Alabama, Appellee. I typed the statement but, before doing it, I told Bell that he did not have to give us a statement. Bell was not threatened in any manner, coerced, offered any reward or inducement in order to obtain this statement. After typing the statement, I called in Charles E. Rentz, Clerk of the Circuit Court of Marengo County, Alabama, and asked him to notarize the statement if Bell wanted to sign it. Stephens and I left out of the room and left only Rentz and Bell. Rentz has no hands and only stub arms. Bell seemed to be above the average in intelligence.

The cases that Bell was sentenced in involved nearly ten thousand dollars worth of cattle. In my opinion we had ample evidence to convict him without using his confession. The evidence would show that he and his accomplices hauled several loads of cattle to the stock yards in Montgomery, Alabama, in his large cattle truck and sold them through the stock yards. We located quite a number of cattle that he sold in Montgomery and had the owners identify them as being their cattle and with their brands on them.

Peter Hall, a Negro attorney from Birmingham, Alabama, represented Bell in a writ of error coram nobis proceeding which alleged that threats and offers of reward caused him to admit his guilt and sign the statement. Bell testified at this proceeding

while on the witness stand and under oath that the allegations of threats and offers reward alleged in this writ were false and that he voluntarily made the confession.

T. WILMER SHIELDS

Sworn to and subscribed before me this 7th day of October, 1966.

DOROTHY AYDELOTT
Notary Public
Marengo County, Ala.

APPENDIX "O"

THE STATE OF ALABAMA
MARENGO COUNTY

Before the undersigned authority, in and for said county in said state, personally appeared Laura W. Drinkard, who, being by me first duly sworn, deposes on oath and says, as follows:

That my name is Laura W. Drinkard, and I am the Official Court Reporter of the 17th Judicial Circuit of Alabama, and have held such position for more than twenty years last past. I took the testimony in the case wherein Cecal Bell was Petitioner and the State of Alabama was Respondent, which was a petition for a writ of error coram nobis, whereby said Petitioner was represented by his employed counsel, Peter A. Hall, which hearing was held in the Circuit Court of Marengo County, Alabama; that all of my shorthand notes which I took of the testimony and proceedings in said hearing were destroyed in the fire which burned the Marengo County Court House at Linden, Alabama, on October 15, 1965.

LAURA W. DRINKARD

Sworn to and subscribed before me on this 5th day of October, 1966.

JNO. W. DRINKARD
Notary Public, Marengo
County, Alabama

APPENDIX "P"

THOMAS H. BOGGS
District Attorney
17th Judicial Circuit
Linden, Alabama

October 7, 1966

Office Telephone 2651
Residence Telephone 4801

Greene, Marengo and
Sumter Counties

Hon. John Tyson
Assistant Attorney General
State of Alabama
Montgomery, Alabama

Re: Cecal Bell Vs. State of Alabama.
In U.S. Court of Appeals for
Fifth Circuit
No. 23104

Dear John:—

Enclosed are the affidavits which you requested. I enclose as one of the affidavits fact of burning of our records of the writ of error coram nobis proceeding in the fire which destroyed our courthouse, which will make statements of those present who heard what transpired, primary evidence.

I hope these affidavits are strong enough to convince the Court of the truth of what happened.

With personal regards, I am

Sincerely yours,

THOMAS H. BOGGS
District Attorney

APPENDIX "Q"

(AMENDMENT XIV)

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any states deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

(Apportionment of Representatives in Congress)

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and the citizens of the United States, or in any way abridge, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

(Persons Disqualified from Holding Office)

No person shall be a senator or representative in congress, or elector of president and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may, by a vote of two-thirds of each house, remove such disability.

Section 4.

(What Public Debts Are Valid)

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debt, obligations and claims shall be held illegal and void.

Section 5.

(Power to Enforce This Article)

The congress shall have power to enforce, by appropriate legislation, the provisions of this article.